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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75—415

PORTLAND CEMENT ASSOCIATION, An Illinois Not-For-Profit Corporation,

Petitioner,

v.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

MEDUSA CORPORATION, NORTHWESTERN STATES PORTLAND CEMENT CO.,

Intervenors.

BRIEF OF THE AMERICAN PAPER INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE AMERICAN PAPER INSTITUTE, INC.

The American Paper Institute, Inc. ("API") is the national trade association of the pulp, paper and paperboard industry. Its 200 member firms provide more than 90 percent of all the pulp, paper and paperboard manufactured domestically. The paper industry ranks among the ten largest industries in the United States. Last year it produced 61 million tons of paper and paperboard and

shipped $40 billion worth of goods. The industry employed more than 700,000 people, and in 1974, its outlay in wages, salaries and benefits came to $9 billion.

The economy of the domestic paper industry could be significantly affected by the standards imposed on paper companies under the Clean Air Act.[1] That industry worked with Congress in drafting the 1970 Amendments to the Clean Air Act and the industry continues to support the goals of this legislation. However, the API believes that the decision of the Court of Appeals in this case[2] raises serious problems which may jeopardize fulfillment of the legitimate goals of the Act.

The court below affirmed the determination by the Administrator of the Environmental Protection Agency ("EPA") that a cost-benefit analysis is not required in setting stationary source standards under section 111 of the Clean Air Act.[3] The API believes this decision is inconsistent with the purpose of the Clean Air Act and will have serious adverse consequences for the paper industry. Accordingly, the API addresses this brief to the Court in support of the position of the Portland Cement Association ("Petitioner") that in promulgating stationary source standards under section 111 of the Clean Air Act, the EPA Administrator must consider the cost of pollutant control in relation to expected environmental benefit and public welfare.

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[1] 42 U.S.C. § 1857 *et seq.*

[2] 513 F.2d 506 (D.C. Cir.), *petition for cert. filed,* 44 U.S.L.W. —— (U.S. Sept. 15, 1975).

[3] 42 U.S.C. § 1857c-6.

REASONS FOR GRANTING THE WRIT

I.

The Clean Air Act Mandates That Stationary Source Standards Be Reasonably Related to Cost.

Section 111(a)(1) of the Clean Air Act defines the term "standard of performance" as follows:

> . . . a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

The court below in this case acknowledged that the EPA Administrator was required under that section "to take into account the cost of achieving the emission reduction he prescribes";[4] however, the court declined to require the preparation of a quantified cost-benefit analysis. The API concurs with Petitioner and the other industries filing as *amici curiae* in this case in urging the Court to recognize that failure to relate benefit to cost under section 111 of the Clean Air Act will foster the imposition of excessive cost burdens on the many industries subject to the Act without providing a corresponding benefit to the public.

There is virtually no guidance available in the form of legislative history evidencing Congressional intent with respect to consideration of cost under section 111(a)(1) of the Clean Air Act. We are therefore compelled to look solely to the terms of the statute in order to determine the degree of limitation which Congress intended by the reference to cost in that section.

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[4] 513 F.2d at 508.

In this connection it is important to note that the entire thrust of the statute is toward the imposition of pollution controls and the requirement that industry sustain the cost necessary to provide such controls. The only section in the Clean Air Act which explicitly recognizes the necessity to temper that requirement with a consideration of the costs involved is section 111(a)(1). Its solitary inclusion emphasizes a Congressional determination that stationary source standards must be established with reference to cost; the clear import of that section should not be diminished by overly conservative construction of the statutory terms.

Section 111(a)(1) requires the EPA Administrator to take into account the cost of achieving pollution reduction in determining emission standards. Thus, the consideration of costs is specifically mandated by the statute. Cost cannot be considered in a vacuum; to do so is meaningless. The only factor with which cost can be reasonably juxtaposed in the context of a statute designed to reduce pollution is the measure of reduction achieved. The amount of pollution control and the public benefit derived therefrom must be balanced against the expenditure required to accomplish it. This reduces essentially to a cost-benefit analysis.

The EPA Administrator acknowledges the validity of a very limited application of the principle that benefits must be weighed against the costs required to produce them. He cites two conditions under which he would be forced to abate a stationary source standard on the basis of excessive cost. First, he admits:

> Where the cost of meeting such standards would be so great that the industry could not bear the cost and survive, such standards could not be implemented. . . .[5]

[5] "Excerpts from EPA Response To Remand," Petition For A Writ Of Certiorari, A-61.

The API submits that consideration of cost only in relation to the ability of the industry to survive ignores the only rational test as to whether a particular cost is warranted; *i.e.*, that the benefit being derived merits the expenditure.

The EPA Administrator also concedes:

> . . . where a reduction in emissions that would be achieved by a particular control technique would be so grossly disproportionate to the cost of the control technique . . . it would not be required.[6]

He does not reveal how, in the absence of a definitive cost-benefit analysis, that test is to be applied. The API asserts that it is totally meaningless to discuss the concept of "gross disproportion" between benefit and cost in the absence of a quantitative analysis measuring those factors. If the concept of "gross disproportion" is to have any meaning, it must be predicated upon a detailed measurement of the elements involved.

By rejecting the cost-benefit data proffered by Petitioner and recognizing only the two highly subjective tests discussed above, the EPA Administrator effectively ignores the statutory directive that cost must be considered in determining appropriate stationary source standards.

II.

Failure To Observe The Statutory Mandate That Standards Be Reasonably Related To Cost Would Have A Serious Detrimental Effect.

The term "stationary source" is defined under the Clean Air Act to include "any building, structure, facility, or installation which emits or may emit any air pollutant."[7] Thus, the emission standards applicable to stationary

[6] *Id.*

[7] 42 U.S.C. § 1857c-6.

sources under the Clean Air Act directly affect a substantial segment of the nation's industrial facilities.

The importance of cost-benefit consciousness in developing standards of pollution control for stationary sources is particularly critical since this section is directed at new or modified industrial structures. New industrial construction to increase production capacity is necessary for a healthy economy. The direct correlation between such new industrial construction and business expansion, including the creation of new jobs, cannot be disputed. If such construction is seriously impeded or curtailed because of unrealistic pollution control standards applicable thereto, the nation will suffer a substantial and unjustified economic blow.

To seriously handicap the nation's productive resources without providing a concomitant improvement in pollution control would be antithetical to the express purpose of the Clean Air Act:

> to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare *and the productive capacity of its population.* (Emphasis supplied)[8]

That statement of purpose makes clear that the Clean Air Act was intended to foster the public welfare in general, including its economic vitality. Achievement of that goal would be frustrated by the adoption of pollution control standards which are not reasonably related to the costs involved in meeting such standards.

Compliance with stationary source performance standards will obviously be a costly matter for the many industries affected. To a large extent the consumer will share the burden of these costs, both directly and in the form of product shortages. To the extent that the goal of reducing the serious pollution problems facing this country is advanced, these costs are justified. Congress never intended, however, that large expenditures be required to achieve minuscule improvements in air quality.

[8] 42 U.S.C. § 1857.

The EPA Administrator is charged with the duty of determining where the line of reasonable relation between cost and benefit is crossed. The only means by which he can make a reliable determination of this important matter is by a quantitative analysis of the cost involved *vis a vis* the benefit conferred. It is urgent that the Court make explicit the EPA Administrator's duty under section 111 of the Clean Air Act to consider the cost-benefit relationship in the formulation of stationary source standards.

III.

The Court Should Determine The Cost-Benefit Issue Presented In This Case.

This case affords a strong factual context in which the Court can establish the important principle raised by Petitioner; *i.e.,* that promulgation of appropriate standards for stationary sources under the Clean Air Act must be based upon cost-benefit analyses. The evidence presented by Petitioner indicates that a twenty-percent increase in cost would be required to accomplish an emission reduction of one-tenth of one percent required under the standard at issue; the ratio of cost to benefit thus adduced is in excess of 100 to 1.

It is difficult to contend, even on the basis of the marginal test which the EPA Administrator acknowledges to be necessary, that these figures do not present a "gross disproportion" between benefit and cost. The clear inference must be that the EPA Administrator failed to consider the cost-benefit evidence before him in this case. The Court cannot condone such a clear refusal to give meaningful consideration to the statutory mandate that

cost of pollution control be balanced against the benefit to be derived therefrom.

The Court has implicitly recognized the importance of including cost considerations as an element of administration of the Clean Air Act by granting certiorari in *Union Electric* v. *E.P.A.*[9] The API submits that the instant case presents another important aspect of the cost issue which should receive direct clarification by the Court at this time.

CONCLUSION

For the foregoing reasons, the Court is respectfully requested to grant Portland Cement Association's Petition for a Writ of Certiorari.

Respectfully submitted,

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[9] 515 F.2d 206 (8th Cir.), *cert. granted*, 44 U.S.L.W. 3178 (U.S. Oct. 7, 1975).